Supreme Court, U.S.
FILED

No. 99 128 JUL 14 1999

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ALASKA CIVIL LIBERTIES UNION,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

D. BRUCE LA PIERRE
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-6477

JONATHAN B. RUBINI *
FOSTER PEPPER RUBINI &
REEVES, LLC
601 West 5th Avenue
Suite 500
Anchorage, Alaska 99501
(907) 222-7100

SUZANNE S. LA PIERRE
938 David Place
Anchorage, Alaska 99501
(907) 277-8825

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12988

QUESTIONS PRESENTED

1. Whether the First Amendment requires the state to demonstrate that campaign finance regulations address some "real problem," an issue now pending in *Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (No. 98-963)?

2. Whether the campaign finance regulations approved by the Alaska Supreme Court, including the limits on candidates' expenditures, a $500 annual limit on individual contributions, a prohibition of certain non-resident contributions, and the restrictions on political party coordinated expenditures, violate the First Amendment?

PARTIES TO THE PROCEEDING

The caption of the case contains the name of all parties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
I. THE ALASKA SUPREME COURT DECISION RAISES THE SAME ISSUE NOW BEFORE THE COURT IN *NIXON v. SHRINK MISSOURI GOVERNMENT PAC* (NO. 98-963)	7
II. ALASKA'S LIMITS ON POLITICAL PARTIES ARE INCONSISTENT WITH *COLORADO REPUBLICAN*	11
A. Alaska Unconstitutionally Restricts Contributions Made By A Political Party To Its Candidates	11
B. Alaska Unconstitutionally Restricts Contributions Made To A Political Party	13
III. ALASKA'S CONTRIBUTION AND EXPENDITURE LIMITS ARE INCONSISTENT WITH *BUCKLEY*	15
A. The Alaska Supreme Court Ignored *Buckley* And Upheld A Limit On Candidates' Expenditures	15

TABLE OF CONTENTS—Continued

Page

B. The Alaska Supreme Court Ignored *Buckley* and Permitted The State To Regulate Contributions Regardless of Size 16

C. The Alaska Supreme Court Upheld A $500 Contribution Limit That Is Different In Kind Than The $1,000 Limit Upheld In *Buckley* 17

D. The Alaska Supreme Court Upheld Contribution and Expenditure Limits On The Basis Of Two State Interests—Leveling The Playing Field And Restricting Total Campaign Costs—That *Buckley* Rejected 19

IV. THE ALASKA SUPREME COURT'S DECISION RAISES QUESTIONS OF BROAD NATIONAL SIGNIFICANCE 20

CONCLUSION 22

APPENDIX:

A. Alaska Supreme Court Opinion 1a

B. Alaska Superior Court Opinion 82a

C. Statutory Provisions 88a

TABLE OF AUTHORITIES

CASES Page

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) 19, 20
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) 18
Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) 16
Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) ..... *passim*
Edenfield v. Fane, 507 U.S. 761 (1993) 7, 18
Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 11
FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 10, 14, 15
FEC v. Colorado Republican Federal Campaign Committee, 41 F. Supp.2d 1197 (D. Colo. 1999) .. 12
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 14
Greater New Orleans Broadcasting Association, Inc. v. United States, 119 S. Ct. 1923 (1999) 8
Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir.), *cert. denied*, 118 S. Ct. 632 (1997) 18
Nixon v. Shrink Missouri Government PAC, 119 S. Ct. 901 (1999) (No. 98-963) ..... i, 7, 22
Russell v. Burris, 146 F.3d 563 (8th Cir.), *cert. denied*, 119 S. Ct. 510 (1998) 9, 18
Service Employees International Union v. Fair Political Practices Commission, 955 F.2d 1312 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992) 16
Shrink Missouri Government PAC v. Adams, 161 F.3d 519 (8th Cir. 1998), *cert. granted sub nom. Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (No. 98-963) 7, 10, 18
Shrink Missouri Government PAC v. Maupin, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) 16
Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 7

TABLE OF AUTHORITIES—Continued

	Page
Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997)	7
United States v National Treasury Employees Union, 513 U.S. 454 (1995)	7
Vannatta v. Keisling, 931 P.2d 770 (Or. 1997)	9, 18

CONSTITUTION AND STATUTES

U.S. Const.: Amend. I	*passim*
28 U.S.C. § 1257	2
Alaska Stat. Ann. § 15.13.065(c) (Lexis 1998)	14
Alaska Stat. Ann. § 15.13.070(b) (1) (Lexis 1998)	2
Alaska Stat. Ann. § 15.13.070(b) (2) (Lexis 1998)	3, 14
Alaska Stat. Ann. § 15.13.070(c) (2) (Lexis 1998)	3, 14
Alaska Stat. Ann. § 15.13.070(d) (Lexis 1998)	3
Alaska Stat. Ann. § 15.13.072(a) (2) (Lexis 1998)	3, 17
Alaska Stat. Ann. § 15.13.072(a) (3) (Lexis 1998)	3, 17
Alaska Stat. Ann. § 15.13.072(e) (Lexis 1998)	17
Alaska Stat. Ann. § 15.13.072(f) (Lexis 1998)	3, 17
Alaska Stat. Ann. § 15.13.074(c) (4) (1996) (amended by § 5, ch. 74 SLA 1998)	4
Alaska Stat. Ann. § 15.13.074(g) (Lexis 1998)	3
Alaska Stat. Ann. § 15.13.112(b) (7) (Lexis 1998)	4
Alaska Stat. Ann. § 15.13.116(a) (7) (Lexis 1998)	4
Alaska Stat. Ann. § 15.13.116(a) (8) (1996) (amended by § 8, ch. 74 SLA 1998)	4
Campaign Finance Reform Act, Alaska Stat. Ann., Temporary and Special Acts, § 1, ch. 48 (Lexis 1996)	10

OFFICIAL ALASKA AUTHORITIES

Informal Advisory Opinion, Alaska Public Offices Commission, Letter of June 3, 1997	3, 13
Election Campaign Finance Reform: Hearing on CSSB 191 Before the Senate Judiciary Committee, 19th Legis., 2d Sess., Tape 96-40, No. 278 (Alaska Apr. 19, 1996) (Statement of Judiciary Committee Chairman)	11

IN THE

Supreme Court of the United States

No. ———

ALASKA CIVIL LIBERTIES UNION,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

---

PETITION FOR WRIT OF CERTIORARI

The Alaska Civil Liberties Union respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alaska (Pet. App. 1a-81a) is reported as *State of Alaska v. Alaska Civil Liberties Union*, No. S-8778, 1999 WL 219443 (Alaska Apr. 16, 1999). The opinion of the Superior Court of Alaska (Pet. App. 82a-87a) is not reported.

JURISDICTION

On April 16, 1999, the Supreme Court of the State of Alaska entered a judgment holding that certain campaign finance regulations were constitutional and did not violate

the First Amendment. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, as applied to the states through the Fourteenth Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const.: Amend. I.

The statute at issue is Alaska's Campaign Finance Reform Act of 1996. The full text of the relevant provisions is set out in the Appendix.

STATEMENT

In 1996, the Alaska Legislature enacted the Campaign Finance Reform Act, 1996 Alaska Sess. Laws, ch. 48 (the "Act").[1] The Act took effect on January 1, 1997.

The Act lowers the amount an individual may contribute to a candidate or group (political action committee) from $1,000 per election to $500 per year. Alaska Stat. Ann. § 15.13.070(b)(1) (Lexis 1998). As there are both primary and general elections in each election cycle in Alaska, the new individual contribution limit is only 25% of the combined $2,000 primary and general election

---

[1] The Act was the legislative response to a proposed citizens' initiative to "reform" Alaska's campaign finance laws that was to appear on the November 1996 general election ballot. The Alaska Attorney General determined that the Act was "substantially similar" to the citizens' initiative, thereby removing the initiative from the ballot.

contribution limit approved in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

The Act restricts the ability of residents of sister states from making contributions to a candidate for elective office in Alaska. Candidates may not accept any contribution from an individual non-resident once an aggregate non-resident contribution threshold is reached. Alaska Stat. Ann. § 15.13.072(a)(2) (Lexis 1998). Non-resident individual contributions to a group or a political party are also restricted. Alaska Stat. Ann. § 15.13.072(f) (Lexis 1998). Non-resident groups are foreclosed from making any contributions. Alaska Stat. Ann. § 15.13.072 (a)(3) (Lexis 1998). The Act also prohibits out-of-district contributions from a registered lobbyist. Alaska Stat. Ann. § 15.13.074(g) (Lexis 1998).

The Act sets limits on the amounts that a recognized political party may contribute to a candidate. Alaska Stat. Ann. § 15.13.070(d) (Lexis 1998). It also imposes severe restrictions on contributions made to a political party. Alaska Stat. Ann. § 15.13.070(b)(2) (Lexis 1998); Alaska Stat. Ann. § 15.13.070(c)(2) (Lexis 1998). The state oversight agency, the Alaska Public Offices Commission ("APOC"), has ruled that any qualified contribution to a political party is deemed to be for the express advocacy of candidates. APOC Informal Advisory Op. (June 3, 1997), Ex. 3 to Pl.'s Reply to State's Opp'n to Summ. J. Mot., *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998). This rule applies even in years when no election is pending. As a result, unlike federal law, contributions intended for generic "party building," party administration, or "get-out-the-vote" activities are subject to the Alaska Act's source and amount restrictions.

Under the Act, candidates may not accept contributions until the year in which the election is to be held. The Act

extends Alaska's pre-existing restriction on fundraising by incumbent legislators during the legislative session to include non-incumbent challengers. The Act also limits post-election fundraising.[2] Alaska Stat. Ann. § 15.13.074 (c)(4) (1996) (amended by § 5, ch. 74, SLA 1998). Candidates can thus accept contributions only during a very short time period.

The Act also imposes expenditure limitations in the form of a "spend-down" provision that limits the amount of unused campaign funds that a candidate may carry-forward to future campaigns. Alaska Stat. Ann. § 15.13.-116(a)(8) (1996) (amended by § 8, ch. 74, SLA 1998).[3] Another provision precludes candidates from using campaign contributions to make contributions to other candidates. Alaska Stat. Ann. § 15.13.112(b)(7) (Lexis 1998).

The Alaska Civil Liberties Union ("AkCLU"), a non-partisan, membership organization which is the state affiliate of the national American Civil Liberties Union, filed suit in Alaska Superior Court on July 3, 1997, seeking a declaration that these provisions of the 1996 Act violated rights to free speech and association protected under the state and federal constitutions. The decisions of both the Alaska Superior Court and the Alaska Supreme Court rest entirely on federal constitutional grounds.

Following cross-motions for summary judgment, on August 10, 1998, Judge Wolverton of the Superior Court

---

[2] This provision was amended in 1998 and extends the period during which contributions can be received following an election from 45 to 60 days or December 31 of the year of the election, whichever is earlier. *See* Alaska Stat. Ann. § 15.13.074(c)(4) (Lexis 1998).

[3] This provision was renumbered as the result of a 1998 amendment. *See* Alaska Stat. Ann. § 15.13.116(a)(7) (Lexis 1998).

ruled that the 1996 Act, in its entirety, violated the First Amendment. The court stated: "it is well settled that without a showing of actual harm, the overriding First Amendment concerns must prevail." App. 84a. The trial court noted that the state itself recognized that the impetus for the restrictions came from popular "concerns that large contributions distorted the political process and made elected officials captive to the pressures of raising campaign funds." *Id.* at 85a (*quoting* State's Mem. in Opp'n to Mot. for Prelim. Inj. at 7). The court concluded that while possibly "present[ing] a very real issue, [this concern] does not represent a 'real harm' of actual or apparent corruption." *Id.* Rather, restrictions based on such concerns reflect an attempt to " 'level the playing field' amongst wealthy and less wealthy citizens." *Id.* at 86a. The court concluded: "To the extent this argument is made or suggested, it is rejected, just as it was rejected in *Buckley*." *Id.*

The Superior Court also rejected the Act's limit on individual contributions to candidates: "[G]iven the fact that the 1996 Act limits contributions to $500 total, versus the $2,000 permitted under *Buckley* in 1976, the only conclusion to be drawn is that the limit set by the 1996 act amounts to a 'difference in kind.' " *Id.* at 85a-86a.

In its unanimous decision of April 16, 1999, the Alaska Supreme Court held constitutional all but two provisions of the Act.[4] In its opinion, the Alaska court recited this

---

[4] The court rejected the non-election year fundraising ban on the ground that contributors' inability to express support and affiliation with a candidate for such a lengthy time period interfered significantly with the right of association. App. 69a. The court also struck down the prohibition against fundraising during the legislative session. The court reasoned that the ban was not narrowly tailored, as the asserted rationale, *i.e.*, avoiding corruption of incumbents, did not apply to non-incumbent challengers. *Id.* at 72a-73a.

Court's "real harm" standard, *id.* at 16a-18a, but then allowed the state to rely on evidence primarily consisting of newspaper accounts, anonymous studies, and affidavits relating the impressions of third parties. *See, e.g., id.* at 5a-6a, 43a-44a, 47a-50a.

The Alaska court expressly approved the state's interest in "leveling the playing field" not only to uphold the Act's restrictions on corporations, labor unions and other business entities, but also to justify the limits imposed on non-residents. *Id.* at 39a-40a. Invoking *Buckley*'s holding that *large* contributions can be regulated to address the "appearance of corruption," the court upheld: (1) total bans on contributions by certain non-residents, *id.* at 40a-41a, and contributions by lobbyists to out-of-district candidates, *id.* at 46a; (2) a reduction in the individual contribution limit from $1,000 per election to $500 annually, *id.* at 57a-58a; and (3) post-election fundraising more than 45 days after an election, *id.* at 71a. The court upheld expenditure limits on the amount of unused campaign funds a candidate may carry forward to a future campaign, *id.* at 75a, and a complete ban on inter-candidate transfers of campaign funds, *id.* at 78a, to prevent avoidance of the Act's contribution limits.

REASONS FOR GRANTING THE PETITION

The Alaska Supreme Court upheld a series of campaign contribution and expenditure limits that is far more restrictive than any previously approved by an appellate court. Standing alone, many of the restrictions are more burdensome than similar provisions rejected by this Court and by the federal courts of appeals. Taken together, the regulatory scheme now in place in Alaska is unparalleled in the extent of its judicially sanctioned restrictions on campaign finance activities.

I. THE ALASKA SUPREME COURT DECISION RAISES THE SAME ISSUE NOW BEFORE THE COURT IN *NIXON v. SHRINK MISSOURI GOVERNMENT PAC* (NO. 98-963).

This Court has decided to review the judgment of the United States Court of Appeals for the Eighth Circuit that Missouri's limits on campaign contributions violate the First Amendment because the state "failed to come forward with evidence" that campaign contributions cause any "real problem." *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 522 (8th Cir. 1998), *cert. granted sub nom. Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (No. 98-963). The Alaska Supreme Court decision presents the same fundamental issue as the Missouri case: whether a state must demonstrate that limits on individual contributions to candidates and to political parties, limits on a political party's contributions to its candidates, and limits on candidates' expenditures address some "real problem."

To regulate speech, the state must prove that the harms that it recites are "real, not merely conjectural" and that, at a minimum, the regulation "will in fact alleviate these harms in a direct and material way." *See United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) ("*NTEU*") (*quoting Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion of Kennedy, J.) (internal quotation marks omitted)). The Court has required proof that regulations of commercial speech, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), of government employees' speech, *NTEU*, 513 U.S. at 475, of cable television programming, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997), and of independent expenditures by political parties, *Colorado Republican Federal Campaign Committee*

v. FEC, 518 U.S. 604, 618 (opinion of Breyer, J.), 647 (opinion of Thomas, J.) (1996), address a "real harm."

Indeed, as the Court held recently in a commercial speech case, the "requirement" that government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" is "critical." *Greater New Orleans Broadcasting Association, Inc. v. United States*, 119 S. Ct. 1923, 1932 (1999) (internal quotation marks and citations omitted). Absent some evidence of real harm, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* (internal quotation marks and citations omitted). Similarly, absent evidence of some real harm, Alaska "could with ease restrict [political] speech in the service of other objectives"—leveling the playing field, protecting incumbents, or merely pandering to popular fears—"that could not themselves justify a burden on [political] expression."

The Alaska Superior Court correctly held that the state could not regulate campaign financing "without a showing of actual harm" and that, under *Colorado Republican*, Alaska "must demonstrate the existence or appearance of corruption." App. 84a-85a. The state, however, pointed only to "concerns that large contributions distorted the political process and made elected officials captive to the pressures of raising campaign funds." *Id.* at 85a. In rejecting this attempted justification, the Superior Court recognized that "a generalized fear of potential for corruption and undue influence" is not enough to override the First Amendment. *Id.* at 84a.

The state Supreme Court, however, merely recited this Court's "real harm" standard, *id.* at 16a-18a, and then upheld a $500 limit on campaign contributions and other

contribution limits, as well as restrictions on candidates' expenditures, on the basis of mere speculation and conjecture. Alaska did not present any evidence of actual corruption attributable to campaign contributions in excess of $500. In fact, it made no showing that there were even any hints of *quid pro quo* exchanges of votes for contributions from any individual, business organization, labor union, or political action committee.

The state's "evidence" about the "appearance of corruption," while voluminous, consisted of little more than newspaper articles and editorials, "studies" quoting anonymous sources,[5] and self-serving affidavits submitted by proponents of a campaign finance "reform" initiative. *See, e.g., id.* at 5a-7a, 35a, 43a-45a, 47a-48a, 76a. Although the state presented affidavits of a few public officials, these affidavits also fell far short of any showing that campaign contributions or expenditures in Alaska cause any real harm.[6] *Id.* at 6a, 35a-36a, 44a, 49a-50a, 76a.

---

[5] The Josephson Institute Study supplied by the state and relied on by the Alaska Supreme Court includes the anonymous and unsworn "opinions" of lobbyists, legislators, and state public officials. *See* "The State of Legislative Ethics in the State of Alaska," April 2, 1990, Appellant's Excerpt of the Record 1, 11, *State of Alaska v. AkCLU*, 1999 WL 219443 (Alaska Apr. 16, 1999) (No. S-8778).

[6] Much of the remaining evidence was raw or summarized data of corporate, lobbyist, and non-resident contribution patterns. *See, e.g.*, L. Makinson, "Open Secrets," 1986, 1987, Def.'s Opp'n to Summ. J. Mot., Exs. E, F, *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998); Stern Aff., *id.*, Ex. A. This data, standing alone, does not establish corruption or the appearance of corruption. *See Russell v. Burris*, 146 F.3d 563, 569 (8th Cir.), *cert. denied*, 119 S. Ct. 510 (1998); *Vannatta v. Keisling*, 931 P.2d 770, 785-87 (Or. 1997). The state's "best" evidence of corruption or the appearance of corruption was the affidavit of a former legislator, David Finkelstein, who stated that "[a]lthough I cannot recall the exact subject of [some] minor bills, I do recall that large contributions had an effect on my vote on some of them." Finkelstein Aff., ¶ 7, Appellant's Excerpt of the Record at 61-62, *State of*

It is hardly surprising that the state has no evidence that campaign contributions in Alaska cause any "real problem" of corruption or even of the appearance of corruption. *Shrink Missouri Government PAC v. Adams*, 161 F.3d at 522. The principal purposes of the 1996 Act were to shorten the length of campaigns, to curtail fundraising and the amount of political expenditures, and to restrict the influence of certain "undesirable" entities.[7] Such purposes, however, are not constitutionally sufficient to justify campaign contribution and expenditure limits. *See FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*") ("preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances"). The Alaska Supreme Court, nonetheless, repeatedly relied on these, and other constitutionally inadequate purposes to sustain the Act. *See, e.g.*, App. 5a-7a, 24a, 43a-44a ("special influence" over or access to politicians by "special interests"); *id.* at 3a, 5a-6a, 47a-50a, 67a (general public dissatisfaction with politicians); *id.* at 23a-24a,

---

Alaska v. AkCLU, No. S-8778, 1999 WL 219443 (Alaska Apr. 16, 1999); *see* App. 49a. Mr. Finkelstein, however, was a leading proponent of the campaign finance initiative that led to the enactment of the 1996 Act and his statement "is conclusory and self-serving, given [his] vested interest in having the courts sustain the law" that he supported. *Shrink v. Missouri Government PAC v. Adams*, 161 F.3d at 522.

[7] Three of the six legislative findings set forth in the 1996 Act focus on escalating campaign costs and the allegedly excessive lengths of campaigns. Campaign Finance Reform Act, Alaska Stat. Ann., Temporary and Special Acts, §§ 1(a)(1), (2), (4), ch. 48 (Lexis 1996). Two findings mention corruption, but they are restricted to allegations about the possibility of undue influence by groups pejoratively labeled "organized special interests" and about the possible conversion of campaign funds to personal use. *See id.*, §§ 1(a)(3), (5). The AkCLU did not challenge the state's power to prohibit conversion of campaign funds to personal use.

39a-40a ("disproportionate influence"); *id* at 40a ("distortion" of the political process). As the Chairman of the Senate Judiciary Committee observed, the campaign finance initiative, which prompted the legislature to limit contributions and expenditures, was "foisted on the public as an all-encompassing solution to a perceived problem that does not exist." *Election Campaign Finance Reform*: Hearing on CSSB 191 Before the Senate Judiciary Committee, 19th Legis., 2d Sess., Tape 96-40, No. 278 (Apr. 19, 1996).

II. ALASKA'S LIMITS ON POLITICAL PARTIES ARE INCONSISTENT WITH *COLORADO REPUBLICAN*.

This Court has often recognized that political parties have a unique role in our political system. *See, e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). As Justice Kennedy observed, "[w]e have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity." *Colorado Republican*, 518 U.S. at 630 (Kennedy, J., concurring in the judgment and dissenting in part). The Alaska restrictions on both contributions to and contributions from a political party, however, substantially inhibit the ability of the political parties in Alaska to fulfill their traditional role in the political process.

A. Alaska Unconstitutionally Restricts Contributions Made By A Political Party To Its Candidates.

In *Colorado Republican*, this Court rejected limits on independent expenditures by political parties. The Court declined, for "prudential" reasons, to consider whether coordinated party expenditures could constitutionally be limited, and it remanded the case for further factual and

legal development.[8] 518 U.S. at 625-26. The issue reserved in *Colorado Republican* is squarely presented in this case.

Alaska campaign finance law distinguishes only between an "independent expenditure," *i.e.*, one made without coordination or consultation with a candidate, and a "contribution." What would be labeled a "coordinated expenditure" in federal law is, under Alaska law, a "contribution." Alaska thus sweeps within its annual contribution restriction coordinated expenditures made in consultation with an affiliated candidate.

The Alaska Supreme Court validated the restriction on coordinated expenditures on two grounds. First, it concluded that party contributions would otherwise provide a loophole to individual contribution limits: "[a]bsent any limits on contributions by parties, we believe there would be substantial potential for undue influence, *i.e.*, quid pro quo corruption or the appearance of corruption." App. 62a.

Second, the Court also noted "[t]he natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself." *Id.* This second ground, however, is inconsistent with the views of the four members of the *Colorado Republican* Court who addressed the question of limits on coordinated expenditures. As Justice Kennedy stated:

> [I]t would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consulta-

---

[8] On remand, the Colorado District Court held the coordinated expenditure ban unconstitutional. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp.2d 1197 (D. Colo. 1999).

> tion." The party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here.

518 U.S. at 630 (Kennedy, J., concurring in the judgment and dissenting in part). Similarly, as Justice Thomas noted, "[t]he very aim of a political party is to influence its candidate's stances on issues and, if the candidate takes office or is reelected, his votes." *Id.* at 646 (Thomas, J., concurring in the judgment and dissenting in part). As the "very aim" of a party is to "influence its candidate's stances on issues," the Alaska Supreme Court erred in deeming this relationship "corrupting" so as to justify the restriction on coordinated expenditures made by political parties.

B. Alaska Unconstitutionally Restricts Contributions Made To A Political Party.

Alaska law also restricts contributions *to* a political party to a far greater extent than approved by this Court in *Buckley* or *Colorado Republican*. Alaska presumes that all contributions to a political party are intended for the express advocacy of candidates.[9] That presumption is false, and it creates two related constitutional issues.

First, political parties engage in a host of necessary party-building functions, like voter registration and get-

---

[9] In an informal advisory opinion of June 3, 1997, the APOC stated that "[it] has previously determined that all actions by political parties are inherently tied to the nomination and election of candidates." Letter of June 3, 1997 to Ken Jacobus at p. 2. *See* Pl.'s Reply to State's Opp'n to Summ. J. Mot., Ex. 3, *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998).

out-the-vote campaigns, that do not, unlike contributions to candidates, create any risk of corruption. Federal law distinguishes "hard money" contributions to candidates that may create some risk of corruption and "soft money" contributions for party-building activities, and *Buckley* upheld limits only on contributions to candidates. *See* 424 U.S. at 23-38. Alaska law, however, does not make this distinction, and the limit on contributions to a political party, which includes funds intended for party-building activities, violates the fundamental principle that preventing corruption or the appearance of corruption are the only interests sufficiently compelling to justify limits on political contributions. *NCPAC*, 470 U.S. at 496-97. Absent a risk of corruption, Alaska may not limit contributions to a political party. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (corporate advertising on public issues does not create any risk of corruption that would justify regulation).

Second, the Alaska presumption that all contributions to a political party are intended for the express advocacy of candidates discriminates against political parties with respect to ballot issues. Alaska law permits all groups, except political parties, to accept unlimited contributions from all persons (including business entities) for the purpose of supporting or opposing ballot issues. *See* Alaska Stat. Ann. § 15.13.065(c) (Lexis 1998). Contributions to a political party, however, even if they are specifically earmarked for advocacy of ballot issues, are subject to the Alaska Act's source and amount restrictions. *See* Alaska Stat. Ann. §15.13.070(b)(2), (c)(2). Although political parties merit special constitutional protection, Alaska subjects them to more stringent restrictions than it imposes on other groups. *See Colorado Republican*, 518 U.S. at 618 ("[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political

committees the right to make unlimited independent expenditures could deny the same right to political parties) (opinion of Breyer, J.).

III. ALASKA'S CONTRIBUTION AND EXPENDITURE LIMITS ARE INCONSISTENT WITH *BUCKLEY*.

The *Buckley* Court held that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14. *Buckley* and its progeny make clear that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97. The Alaska Supreme Court, however, ignored these well-settled First Amendment principles.

A. The Alaska Supreme Court Ignored *Buckley* And Upheld A Limit On Candidates' Expenditures.

Buckley held that any legitimate government interest in alleviating the corrupting influence of large contributions is "served by . . . contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." 424 U.S. at 55. Expenditure limits reduce "the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *id.* at 19 (footnote omitted), and the Court held that limits on independent expenditures, on candidates' personal expenditures, and on total campaign expenditures violated the First Amendment. *Id.* at 39-58.

Notwithstanding *Buckley*, the Alaska Supreme Court upheld a limit on candidates' campaign expenditures. The Alaska Court approved so-called "spend-down" provisions that limit the amount of unused funds a candidate may carry forward to future election campaigns. App. 75a.

All other courts have held that spend-down restrictions are inconsistent with *Buckley*. *See Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1427-29 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996); *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1323 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992).

B. The Alaska Supreme Court Ignored *Buckley* and Permitted The State To Regulate Contributions Regardless of Size.

Buckley identified only "a single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment" and that "exception relates to the perception of undue influence of *large* contributors to a candidate." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981) (emphasis added). The Court upheld a $1,000 contribution limit because it focused "precisely on the problem of *large* campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified." 424 U.S. at 28 (emphasis added).

Although the Alaska Supreme Court noted that a law banning contributions that are not large is "presumptively overbroad and thus invalid" under *Buckley*, App. 14a, it nevertheless upheld provisions that not only regulate "small" contributions, but in certain cases, prohibit contributions completely. For example, the Alaska Supreme Court upheld: (1) a ban on any contributions from groups not resident in Alaska; (2) a ban on any contributions from non-resident individuals to candidates once an aggregate amount of non-resident contributions have been obtained by the potential recipient; and (3) a percentage limitation on the aggregate amount that Alaska-based groups or political parties may obtain from non-

resident individuals. *See* Alaska Stat. Ann. § 15.13.072 (a)(2), (a)(3), (e), & (f) (Lexis 1998); App. 34a-35a, 40a-41a. Nothing in *Buckley* can be read to justify Alaska's prohibition against a contribution as small as $1.00.[10]

Similarly, the Alaska Supreme Court ignored *Buckley* in upholding a prohibition on contributions by candidates to other candidates or groups, *id.* at 78a, and a prohibition on contributions to candidates 45 days after an election, *id.* at 71a, without regard to the size of the contributions or their capacity to cause either corruption or the appearance of corruption.

C. The Alaska Supreme Court Upheld A $500 Contribution Limit That Is Different In Kind Than The $1,000 Limit Upheld In *Buckley*.

Buckley held that once there is evidence of the corrupting effect of *large* contributions, the Court, as a general rule, will not scrutinize a legislative determination of the appropriate limit. *See* 424 U.S. at 30. Under this standard, the Court approved a ceiling on individual contributions to candidates of $1,000 per election or $2,000 per election cycle (general and primary elections).

The Alaska Supreme Court upheld a $500 limit on individual contributions to candidates. App. 57a-58a. Even ignoring the effects of inflation in the 23 years since *Buckley* was decided,[11] this $500 limit is only 25%

---

[10] The Alaska Supreme Court also upheld a prohibition on contributions from registered lobbyists to candidates representing districts other than that in which the lobbyist resides. App. 46a. Even assuming evidence showing corrupting effects from *large* contributions of this type, an absolute ban on such contributions exceeds the limits approved in *Buckley* and cannot be viewed as "narrowly tailored."

[11] When the effects of inflation are considered, assuming 3% per year, the limit approved by the Alaska court shrinks to less than

of the limit approved in *Buckley*, and as such is "differen[t] in kind." 424 U.S. at 30. No other federal or state court reviewing ceilings on individual contributions has upheld a limit lower than the $1,000 figure approved in *Buckley*.[12] *See, e.g., Shrink Missouri Government PAC v. Adams*, 161 F.3d at 521-23 (invalidating $275, $525, and $1,075 ceilings); *Russell v. Burris*, 146 F.3d at 568-71 (rejecting $300 limit for statewide elective office); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 641-43, 648 & n.24 (6th Cir.), *cert. denied*, 118 S. Ct. 162 (1997) (upholding $1,000 ceiling adopted by legislature after court challenge to $500 limit); *Carver v. Nixon*, 72 F.3d at 634-44 (invalidating limits of $300, $200, and $100); *Vannatta v. Keisling*, 931 P.2d at 787 (invalidating $500 limit).

10% of the amount approved in *Buckley*. Contrary to the Alaska Supreme Court, a number of courts that have considered the constitutionality of contribution caps have taken into account the effect of inflation in making the "difference in kind" analysis. *See, e.g., Carver v. Nixon*, 72 F.3d 633, 641-42 & n.8 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The issue is currently before this Court in *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 522-23 (8th Cir. 1998), *cert. granted sub nom., Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (No. 98-963).

[12] The Alaska Court agreed with the state's argument that reducing Alaska's contribution ceilings would not undermine the ability of a candidate to run an effective campaign. Plaintiff's experts disputed that conclusion. Jacobson Aff., Pl.'s Reply to State Opp'n to Mot. for Summ. J., Ex. 2, *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998); Lottsfeldt Aff., *id.* Ex. 1. The state's principal evidence supporting this contention was the affidavits of several individuals relating their experiences in municipal elections. *See* App. 53a. This information is not relevant to state legislative races. *See* Lottsfeldt Aff., Pl.'s Reply to State Opp'n to Mot. for Prelim. Inj., Ex. 3, *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998). Moreover, to the extent the Alaska Court shifted the burden to the AkCLU to show that the Act's contribution limits would impair the ability of a candidate to wage an effective campaign, its holding is in error. *See Edenfield v. Fane*, 507 U.S. at 770.

D. The Alaska Supreme Court Upheld Contribution and Expenditure Limits On The Basis Of Two State Interests—Leveling The Playing Field And Restricting Total Campaign Costs—That *Buckley* Rejected.

The only interest recognized by *Buckley* as sufficient to justify restricting rights of political expression is preventing corruption or the appearance of corruption. The Court specifically rejected the government's asserted need "to equalize the relative ability of all citizens to affect the outcome of elections" and to impose "a brake on the skyrocketing cost of political campaigns." *Buckley*, 424 U.S. at 26 (footnote omitted). The Court held that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49.

In upholding restrictions on non-resident contributions, the Alaska Supreme Court explicitly embraced the proscribed "leveling the playing field" rationale. It acknowledged that "[t]he State refers us to no specific evidence of corruption or the appearance of corruption caused by out-of-state contributions, and does not contend that quid pro quo corruption justifies these restraints." App. 35a. The court concluded nonetheless that while "[t]hese non-resident contributions may be individually modest, . . . [t]hey can cumulatively overwhelm Alaskans' political contributions." *Id.* at 40a. As an attempt to "restrict the speech of some elements of society to enhance the voice of others," the Alaska Supreme Court's decision squarely contradicts *Buckley*.

In support of its decision, the Alaska Supreme Court relied on *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which it read for the proposition that the "potential for distortion" is sufficient to justify

the non-resident prohibitions. App. 40a. In *Austin*, the Court addressed restrictions on *corporate* expenditures and concluded only that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries" warranted the restrictions in that case. 494 U.S. at 660. The *Austin* Court was careful to explain that the limitations did "not attempt to equalize the relative influence of speakers on elections," and further, that "the mere fact that corporations may accumulate large amounts of wealth" was not the factor justifying the restrictions. *Id.* (internal citations and quotation marks omitted). Thus, the Alaska Supreme Court misread *Austin* to support the "leveling the playing field" rationale and compounded this error by using *Austin* to justify limits on individual as opposed to corporate contributions.

IV. THE ALASKA SUPREME COURT'S DECISION RAISES QUESTIONS OF BROAD NATIONAL SIGNIFICANCE.

This Court's decision to review *Shrink Missouri Government PAC* demonstrates that the question of the evidentiary threshold necessary to sustain campaign finance regulations raises an important issue with broad national implications. At a minimum, disposition of this writ should be deferred pending resolution of the Missouri case.

Moreover, several core provisions of the Alaska law present regulatory tools which have not been directly addressed by this Court. Alaska's restrictive bias against non-residents, for example, is neither constitutionally defensible nor sound policy. The restlessness of this nation's population assures that residents of sister jurisdictions often times have personal or business ties to another state. Alaska is no exception. Indeed, Alaska's vast array of natural resources, and its status as home to a dispropor-

tionate percentage of national parks and other federal lands, uniquely affects many Americans. In the contemporary political era, "local" politics often have decidedly national implications. While this Court's prior decisions empower a state to enact restrictions protecting its electoral process against corruption or its appearance, no decisions sanction one state's intolerance of non-residents' participation in its political campaigns.

Similarly, Alaska's various restrictions on contributions to and from a political party harbor broad implications for the vitality and sustainability of our party-oriented political system. Political parties work by establishing a core philosophical ideology and by electing affiliated candidates. Alaska wrongly restricts both a party's access to the resources necessary to articulate a core ideology and its ability to elect affiliated candidates.

Finally, the Alaska Supreme Court misinterprets this Court's decisions in *Buckley, Colorado Republican,* and *Austin* to uphold an unprecedented array of campaign finance regulations and invites widespread and burdensome regulation of First Amendment activities.

CONCLUSION

The petition for writ of certiorari should be granted. Alternatively, the Court should defer disposition of the petition until it decides *Nixon v. Shrink Missouri Government PAC* (No. 98-963).

Respectfully submitted,

Of Counsel:

D. BRUCE LA PIERRE
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-6477

JONATHAN B. RUBINI *
FOSTER PEPPER RUBINI &
REEVES, LLC
601 West 5th Avenue
Suite 500
Anchorage, Alaska 99501
(907) 222-7100

SUZANNE S. LA PIERRE
938 David Place
Anchorage, Alaska 99501
(907) 277-8825

* Counsel of Record

July 14, 1999